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OFFICE OF PETITIONS
ON PETITION

In re Application of
Brioni et al.
Application No. 09/985,974
Filed: November 7, 2001
Attorney Docket No. 6753.US.02

This is a decision on the petition under 37 CFR 1.137(b), filed March 24, 2003, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is not final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to reply in a timely manner in reply to the non-final Office action mailed September 10, 2002, which set a shortened statutory period for reply of three months from the mail date of the Notice. No extensions of time under the provisions of 37 CFR 1.136 have been obtained. Accordingly, the above-identified application became abandoned on December 11, 2002.

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The instant petition lack(s) item(s) (1).

As to item (1), The instant petition was accompanied by a request for continued examination (RCE) under the provisions of 37 CFR 1.114. However, the filing of a RCE was improper since prosecution in the application had not closed. Prosecution in an application is closed when an application is under appeal, or the last Office action is a final action, a notice of allowance, or an action that otherwise closes prosecution in the application. Since the non-final Office action of September 10, 2002 did not close prosecution, the filing of an RCE was improper. Accordingly, the RCE filed on March 24, 2003 will not be processed.

In view thereof, the \$750 RCE fee will be refunded to petitioner's deposit account. The response required for a grantable petition to revive in this case must be either an Amendment that places the application in condition for allowance, a Request for Reconsideration, or a Continuing Application. See MPEP section 711.03(c).

An extension of time under 37 CFR 1.136 must be filed prior to the expiration of the maximum extendable period for reply. See In re Application of S., 8 USPQ2d 1630, 1631 (Comm'r Pats. 1988). Accordingly, since the \$930 extension of time submitted with the petition on March 24, 2003 was subsequent to the maximum extendable period for reply, the extension of time is unnecessary. Accordingly, the \$930 fee will be credited to petitioner's deposit account.

Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries concerning this decision should be directed to Latrice Bond at (703) 308-6911.



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